

The

PROSECUTOR



RECENT CASES

United States Supreme Court

Officer's Actions Not Plainly Incompetent

Officer Stanton responded to an unknown disturbance in a neighborhood known for gang violence. When Stanton arrived he noticed three men walking together down the street. Two immediately turned into an apartment complex and the third, Patrick, ran across the street. Stanton shouted, "Police," and ordered Patrick to stop. Patrick looked at Stanton and quickly went through the front gate of a fence, which

was six feet tall, in front of the house. The house belonged to Ms. Sims, whom the officer had not seen or had any interaction with. Stanton followed Patrick toward the house and when he did not stop believed he had committed a jailable misdemeanor. Stanton quickly decided to kick in the door the fence. When he did so the fence hit Ms. Sims, cutting her forehead and injuring her shoulder.

Sims filed suit against Stanton in Federal District Court under §1983, alleging that Stanton unreasonably searched her home without a warrant in violation of the Fourth Amendment. The district court granted summary judgment to Stanton. Sims appealed and the U.S. Court of Appeals for the Ninth Circuit reversed holding that because Patrick was only suspected of a misdemeanor, and so the warrantless search was unjustified. The Circuit Court concluded that because the warrantless search was unjustified, Stanton did not have qualified immunity.

The U.S. Supreme Court held the standard was whether Stanton was "plainly incompetent" in entering Sims' yard to pursue Patrick. This requires there be clearly established law preventing his actions. The Supreme Court held that the

law at the time of Stanton's actions was: "Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided." The Supreme Court held that while Stanton's actions were unconstitutional, he was not plainly incompetent. The Supreme Court reversed the Ninth Circuit decision and remanded the case. [*Stanton v. Sims*, U.S., No. 12-1217, 11/4/13](#)

Counsel Presumed To Render Adequate Assistance

Respondent and Billie murdered Billie's husband by pouring vodka down his throat and smothering him with a pillow. Respondent reached an agreement with the state prosecutors to testify against Billie, plead guilty to manslaughter and receive a 7-15 year sentence. Then three days before Billie's trial was supposed to start respondent retained a new lawyer, Toca. Respondent and Toca demanded a much lower sentence, only three years, in

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LEGAL BRIEFS



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exchange for his agreement to testify and pleading guilty. Prosecutors refused to accept the new demands and the case went to trial. Defendant was convicted of second degree murder and received a sentence of 20-40 years in prison.

On direct appeal, respondent claimed ineffective assistance of counsel. He claimed his attorney did not take enough time to become familiar with the facts to realize the strength of the State's case. The Michigan Court of Appeals rejected that claim holding the defendant was responsible for the actions by asking for the attorney and claiming he was innocent. The Sixth Circuit reversed finding the factual predicate for the state court's decision was unreasonable.



The U.S. Supreme Court held the Sixth Circuit failed to apply the "doubly deferential" standard of review

recognized by the Court's case law when it refused to credit the state court's reasonable factual finding and assumed that counsel was ineffective where the record was silent. The court reversed holding "that counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

[Burt v. Titlow, 2013 BL 306264, U.S., No. 12-414, 11/5/13](#)

Statements From Court Ordered Psych Evaluation Permitted For Rebuttal

Defendant was arrested after he shot and killed two law enforcement officers. A few hours before defendant killed the officers defendant had cooked and smoked methamphetamine. The State charged defendant with capital murder, but then the State's death penalty scheme was found unconstitutional. The State dismissed the charges and let the federal authorities seek the death penalty.

In the federal case, defendant claimed voluntary intoxication as a defense. defendant was ordered to submit to a psychiatric evaluation to assess how meth affected him when he shot and killed the officers. Meanwhile, the death penalty scheme was determined to be constitutional again. The federal case was suspended and eventually dismissed on behalf of defense counsel's inability to continue.

The state then took up the charges again. Defendant again claimed voluntary intoxication as a defense and offered testimony of an expert in support of the defense. Prosecution sought to present rebuttal testimony of the expert who had examined him for the federal case. Defense counsel claimed admitting testimony from the court ordered psychological examination was not allowed because and it violated his Fifth Amendment right protection against self-incrimination.

The U.S. Supreme Court held a State may introduce the results of such an examination for the limited purpose of rebutting a mental-status defense, on the basis that voluntary intoxication is not a mental disease or defect under Kansas law. This rule was distinguished from the rule holding that introducing a court-ordered psychiatric examination violated a defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute. The U.S. Supreme Court vacated the Kansas Supreme Court's decision and remanded the case. [Kansas v. Cheever, U.S., No. 12-609, 12/11/13](#)

Utah Supreme Court

Water Rights Law Clarified

The Irrigation Companies and Frank Vincent are water rights holders on the Sevier River system. The Irrigation

Companies are nonprofit Utah corporation that distribute water to their shareholders for irrigation of agricultural land in Millard County.

Vincent bought his water rights from Samuel McIntyre in 1998. McIntyre bought the rights in 1936 and they were allotted based on the 1,051.5 acres of land that McIntyre used to for farming. Since Vincent bought the land he used it to farm and to run a commercial bird-hunting business.

Irrigation companies in Millard County filed a complaint in district court alleging that Vincent's water right had been partially forfeited and partially abandoned. They alleged that McIntyre had only irrigated 830 acres and that Vincent had



only irrigated 900 of the acres. Vincent claimed that the water rights were not abandoned or forfeited, but rather unusable and un-storable.

The court examined the pre-2002 Forfeiture Statute in conjunction with Utah Code section 73-1-3 (the Beneficial Use Statute). The court held if an appropriator ceases to beneficially use a water right, the wasted or unused water is made available to other appropriators. In Utah, the process for making such water available to other appropriators is governed by the Forfeiture Statute. The court held that the pre-2002 Forfeiture Statute unambiguously permitted partial forfeiture. The court also concluded that the exception located in Utah Code section 73-1-4(3)(f)(i) (subsequent to 2002 amendments) is a codification of the physical-causes exception—not a rule that forfeiture can never occur when a water right is not fully satisfied. The court also clarified that abandonment is a common-law cause of

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action that requires a showing of intent to relinquish. The court also held that Vincent's water right is 5,000 acre feet based on what was used prior to Vincent.

[Delta v. Vincent, 2013 UT 69](#)

State Allowed To Bring Arguments That Were Not Decided, Bear Not Natural Condition Of Land

A black bear attacked a man while he was sleeping in his tent on June 16, 2007. That man and friends were successful in scaring the bear away and notified the Division of Wildlife Resources (DWR). DWR classified the bear as a threat to public safety and determined that the bear needed to be destroyed. Two agents attempted to track the bear on the same day, but were unsuccessful. The agents did not leave a warning at the campsite or post a warning on the road, or close the road leading to the campsite. The agents figured it was already late on a Sunday evening and that no one would be camping there that night.

The Mulveys set up camp that evening at the same campsite, cooked dinner, put their coolers and garbage in their car and went to bed in a single tent. However, Sam, the victim, brought a granola bar and can of soda into the tent that night. The same bear that had attacked people early that day entered the campsite, pulled Sam from the tent and killed him.

Initially, the State argued the permit exception to the Utah Governmental Immunity Act protected the State from liability. However, the court of appeals held the permit exception was inapplicable to the facts of this case. On remand, the State claimed two alternative arguments. The State argued that it owed no duty to the Mulveys and that if it did owe a duty, the natural condition exception precluded liability.

On remand, the state brought two alternative theories for dismissal. The plaintiffs argued the State was precluded from raising them on remand because they were not



brought originally. The Utah appellate court held the State was not precluded from raising these arguments because the court did not rule on the merits of these arguments.

The Utah Supreme Court held the court's refusal to reach the state's two



alternative theories for dismissal in *Francis I* did not preclude the state from raising them on remand. The supreme court held these theories were not precluded because the court did not rule on the merits of them. The supreme court then held the district court erred in granting the State's motion for summary judgment because the State's protective actions directed at the campsite gave rise to a duty of care to the Mulveys as the next occupant of the campsite. Furthermore, the court held the natural condition on the land exception did not apply because the bear was not topographical in nature. The court held that because the exception did not apply the State was not immune from liability under the Immunity Act. [Francis v. State, 2013 UT 65](#)

Intervening Change In Law Merits Equitable Tolling Of Statute Of Limitations

In 2002 an Odgen police officer, Burnett, and another officer performed a "knock and talk" investigation of a motel room. A woman answered the door and allowed the officers to enter. As the officers entered they heard the bathroom door slam shut. The officers asked who was in the bathroom and she replied her boyfriend was. The officers then entered the bathroom without permission and found appellant with methamphetamines and a gun. Appellant was convicted of being a felon in possession of a firearm and possession of a controlled substance.

On appeal, the U.S. Court of Appeals for the Tenth Circuit

overturned appellant's conviction. Shortly thereafter, appellant brought a 1983 claim against Officer Burnett. Mr. Burnett moved for summary judgment claiming appellant's claim was barred by the statute of limitations. The Tenth Circuit certified the question to the Utah Supreme Court because the equitable tolling law under Utah is controlling.

The question presented to the Utah Supreme Court was: Thomas Garza filed his complaint, approximately two years remained in [the] limitations period [before his claim would become time-barred]. A Supreme Court decision soon after filing, however, overturned those decisions and rendered his complaint approximately ten months late. Under Utah law, does an intervening change in controlling circuit law merit equitable tolling under these circumstances?

The Utah Supreme Court answered that, yes "Under Utah law, an intervening change in controlling law that extinguishes a previously timely cause of action does merit equitable tolling of the statute of limitations." [Garza v. Burnett, 2013 UT 66](#)

Motion To Arrest Judgment Did Not Preserve Appeal

Defendant and his wife, Jan, gained custody over defendant's five children from his step-daughter Jamie. Jamie had addiction and behavior problems and was incarcerated. When Jamie was released from prison she went to live with defendant, Jan, and the five children. Defendant and his Jan's relationship became strained and eventually they divorced. Defendant moved to Las Vegas while Jamie, Jan, and the five kids moved to St. George.

Defendant would often visit the kids in St. George. He would rent a hotel room, take the kids swimming, and go out to eat. The kids all looked forward to these visits and things went well for some time. Eventually, Jamie noticed M.V., her youngest daughter, playing with naked Barbies and making them move on top of

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PROSECUTOR PROFILE



Grant Charles Deputy Duchesne County Attorney

Grant Charles was born in Provo and grew up on a small farm between Salem and Payson. He goes by either Grant or Charles because he has “gotten so used to people mixing up which is my first and which is my last name that I usually don’t even notice.” He says he doesn’t have any nicknames because, “Who needs a nickname when you have three first names?” , his middle name being a middle name also.

Law School: Thomas Jefferson School of Law

Favorite Food: Italian

Last Book Read: Confederacy of Dunces by John Kennedy Toole

Favorite Singer: Cher

Favorite TV series: M.A.S.H

Favorite Movie: Braveheart

The Last Book Read: A Feast for Crows by George R.R. Martin

Grant’s first job was delivering the Utah County Journal when he was four years old. The route was in his older brother’s name. That might be why Grant says he thought he was born into some form of slavery on the family farm. Now that he enjoys helping on the farm he rarely has time to. Before becoming a prosecutor he was a member of the defense bar.

Grant says he has “Pets, beasts of burden, livestock, pests & parasites we have it all. I run hounds on Bears, Lions, Bobcats and Raccoons which also means I have a disease which causes me to hoard them. I currently have ten. I’m also a recovering bird hunter with two hunting Weimaraners. We have twelve horses to go along with our twelve dogs, an ever changing number of cows, pigs, chickens, peacocks, pheasants, quail, partridges, and rabbits. We also have three cats which the hounds ensure spend a fair amount of time in trees around the farm.”

Grant feels the most satisfying aspect of the job is seeing people successfully deal with adversity. He likes seeing defendants improve their lives and enjoys witnessing the resilience of victims who pick up the broken pieces of their lives and put them back together to find happiness. The least satisfying aspect has been cases in which victims or defendants have given up and the hardest thing he has had to do was explaining to a victim that he couldn’t help her because the statute of limitations had passed for the crimes that were in effect at the time she was taken advantage of.

The most embarrassing thing that has happened to him is when he passed out in court when he was still practicing criminal defense. He broke my jaw and got a concussion when he hit the prosecutors table on my way to the ground. His new most embarrassing moment could be admitting that Cher is his favorite singer.

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each other in a sexual way. Jamie asked if anyone had ever touched her like that and told her that Barbies don't play that way. M.V. did not respond, but later she was again playing with Barbies in the same way. This time when Jamie asked M.V. about being touched inappropriately, she told her that defendant had touched her. B.B., the older daughter, also indicated that defendant had often molested her while at the hotel in St. George. Defendant was charged with sexual abuse of a child and dealing in materials harmful to a minor.

Just before trial Jamie stated that defendant had also molested her when she was a young girl in his home. The court determined this account was unreliable and instructed counsel to not refer to the account. At trial, the prosecutor mentioned Jamie's account in his closing arguments.



After trial, defendant moved to arrest judgment pursuant to Rule 23 of the Utah Rules of Criminal

Procedure claiming the evidence used to convict him was inherently improbable; that the trial court erred by excluding expert testimony; and that the prosecutor's conduct during closing arguments was prejudicial. The district court denied this motion and the defendant raised the same issues on appeal.

The Utah Supreme Court held defendant's motion to arrest judgment was not sufficient to preserve the issue of prosecutorial misconduct for appeal. Nevertheless, the court held that defense counsel's failure to do anything in response to the prosecutor's conduct constitutes ineffective assistance of counsel. Defendant's convictions were vacated and his case remanded for a new trial. [State v. Larrabee, 2013 UT 70](#)

No Error In Barring Expert Testimony

Defendant was hanging out with some friends from his gang, Ogden Trece, when they went to the home of Ms. Rivera to hang out. When they arrived at the home

they were told they were not welcome. They entered the home over the objection of the person in charge of the home, Ms. Valencia. Ms. Valencia then went to the home of Mr. Nava, a member of the rival gang, the Nortenos. While she was walking to the home, defendant and his friends followed her and started arguing. Soon people from Mr. Nava's home were arguing with defendant and his friends. Then someone fired a shot into the air and defendant and his friends ran back to their car. As their car was leaving, defendant shot over the roof of the car from the passenger's seat at Mr. Nava's home. He killed two people and injured others.

At trial, defense counsel attempted to present the testimony of an expert on crime scene reconstruction. The court granted the State's motion to exclude the expert's testimony. Defendant was convicted and appealed claiming it was prejudicial to deny the testimony of his expert.

The Utah Supreme Court held that the district court did not err by not allowing the testimony of the crime scene reconstruction expert because his testimony was not accurate and commented directly on the veracity of the State's witness. Defendant's conviction was upheld. [State v. Perea, 2013 UT 68](#)

Information Charging DNA Profile Allowed

A twenty-three year old girl was brutally attacked and sexually assaulted in an alley in November 1996. A rape examination was conducted and a DNA profile was created. No match was immediately found and police were unable to locate any suspects. With the statute of limitations approaching the State filed an information charging John Doe, an unknown male with the crime and identifying him by DNA profile.

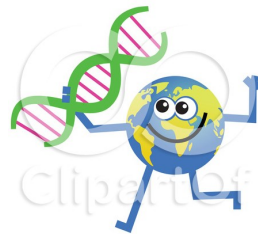
Two years later a match for the DNA profile of the unknown assailant was identified in CODIS. The profile matched

defendant who was being held in an Illinois county jail on charges stemming from the serial murder of three women and the attempted murder of a fourth woman. A sample was obtained from defendant and the DNA profile was matched again.

Defendant's charges in Illinois were dismissed and defendant was extradited to Salt Lake City. He was charged with the crimes that were earlier filed. His trial last four days and defendant was convicted. Defendant appealed, claiming the statutes of limitations had run before the commencement of his prosecution and alternatively that his right to speedy trial has been violated.

The Utah Supreme Court held defendant was prosecuted within the applicable statute of limitations. The court held that while the information did not have defendant's name, it did identify defendant by DNA, which "is as close to an infallible measure of identity as science can presently obtain." The court held that the first information was valid and therefore the statute of limitations did run on the charges against defendant.

The Utah Supreme Court also held defendant's right to a speedy trial was not violated. The court found the length between the filing of the first information and the trial extraordinary. The court weighed the many factors and found that the factors favored the government's delay. The court held that defendant was not prejudiced because "the State did not delay to gain some impermissible advantage at trial" and so the delay was not in "bad-faith." Defendant's conviction was affirmed. [State v. Younge, 2013 UT 71](#)



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Utah Court of Appeals

Hand To Hand Exchange Sufficient For Probable Cause

Defendant pulled up to a parking spot at a gas station and stayed in the car. A few minutes later another car pulled up. Defendant got out of her car walked over to the car spoke to the person in the car and then took a \$100 bill. An officer from Orem City police watched the transaction and identified it as a drug transaction consistent with his training.

Defendant then left the parking lot and was driving away when the officer pulled her over. The officer asked her to step out of the car. When she stepped out he questioned her about the transaction and asked to see what was in her pockets. She explained she was just there to get the money, but then showed the officer prescription pills she did not have a prescription for and the officer also saw a baggie commonly used for drugs. The officer searched her pocket and found the baggie with meth inside.



Defendant moved to suppress the evidence claiming the officer did not have reasonable, articulable suspicion to initially detain her. The Utah Court of Appeals held that based on the officer's training in hand-to-hand drug transactions, he "had an objectively reasonable basis to suspect that the behavior he observed that day in the gas station parking lot suggested criminal activity." Defendant contended that an officer's observation of a hand-to-hand exchange in an area known for drug trafficking is not enough of a basis for detaining her. The court did not agree and held an officer's observation of a hand-to-

hand exchange in an area known for drug trafficking can be a sufficient and independent basis for reasonable suspicion that the defendant is engaged in criminal activity. [State v. Anderson, 2013 UT App 272](#)

No Ineffective Assistance of Counsel For Failure to Testify

Officers set up a drug buy with an informant. The officers told the informant to call him and leave the line open to ensure the officers could hear what was going on. The officers then listened to the transaction, but did not arrest defendant so that informant's identity would remain secure. Defendant was arrested sometime later.

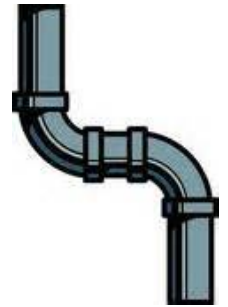
At trial, an issue arose over the recording of the phone call and drug deal. Defense counsel objected to the officer testifying to what happened in the recording of the phone call because the recording was not available to him. Defense counsel went to the officer's office to listen to the call, but when the officer played the recording there was no audio. The State argued that the officer was not testifying about what was on the recording, but rather what he recalled from when he listened to the drug transaction live. The court agreed with the state and allowed the officer to testify about what he recalled from the transaction.

Defendant appealed contending ineffective assistance of counsel because he failed to obtain exculpatory material in the form of trial counsel's own testimony regarding officer Watkin's recording of the drug deal. Defendant claims that because his counsel was the only person that could refute that his voice was on the recording of the drug transaction, he should have excused himself and testified defendant's voice was not on the recording. The court of appeals held that there was no issue because the officer did not testify about what was on the recording, but rather what he recalled from listening to the transaction live. The court held that defendant did not suffer from ineffective assistance of

counsel and his conviction was affirmed. [State v. Cunningham, 2013 UT App 277](#)

Failure To Object Ineffective Assistance Of Counsel

Defendant was seen by a witness yelling and hitting a man on the sidewalk. The witness pulled over because he was concerning for the safety of the victim. As the witness watched, defendant hit the man in the face many times and then pulled out "a pipe" and hit the man on the legs, torso, head and face. The man got on a bike and left the area. The witness called 911, police responded and defendant was arrested. Defendant was charged and convicted of aggravated assault.



On appeal, defendant argued that the jury instructions improperly omitted the definition of "serious bodily injury" and because this issue was not preserved, defendant's trial counsel rendered ineffective assistance in failing to ensure that such an instruction was included.

The Utah Court of Appeals held that the failure to object was deficient performance by defense counsel. The court of appeals also held the court's "confidence in the jury's verdict is undermined because there is a reasonable probability that, had a proper instruction on "serious bodily injury" been given, the jury would have determined that the pipe defendant used to attack Victim was not a dangerous weapon capable of causing death or "serious bodily injury" and the force defendant used was not likely to produce such injury." [State v. Ekstrom, 2013 UT App 271](#)

Counsel's Strategy Not Ineffective Assistance Of Counsel

Feldmiller was convicted of murder. Before trial, Feldmiller requested that lesser included offense instructions be

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On the Lighter Side

A Lawyer's Version of " 'Twas The Night Before Christmas"

Whereas, on or about the night prior to Christmas, there did occur at a certain improved piece of real property (hereinafter "the House") a general lack of stirring by all creatures therein, including, but not limited to a mouse.

A variety of foot apparel, e.g. stocking, socks, etc., had been affixed by and around the chimney in said House in the hope and/or belief that St. Nick a/k/a/ St. Nicholas a/k/a/ Santa Claus (hereinafter "Claus") would arrive at sometime thereafter.

The minor residents, i.e. the children, of the aforementioned House, were located in their individual beds and were engaged in nocturnal hallucinations, i.e. dreams, wherein vision of confectionery treats, including, but not limited to, candies, nuts and/or sugar plums, did dance, cavort and otherwise appear in said dreams.

Whereupon the party of the first part (sometimes hereinafter referred to as "I"), being the joint-owner in fee simple of the House with the parts of the second part (hereinafter "Mamma"), and said Mamma had retired for a sustained period of sleep. (At such time, the parties were clad in various forms of headgear, e.g. kerchief and cap.)

Suddenly, and without prior notice or warning, there did occur upon the unimproved real property adjacent and appurtenant to said House, i.e. the lawn, a certain disruption of unknown nature, cause and/or circumstance. The party of the first part did immediately rush to a window in the House to investigate the cause of such disturbance.

At that time, the party of the first part did observe, with some degree of wonder and/or disbelief, a miniature sleigh (hereinafter the "Vehicle") being pulled and/or drawn very rapidly through the air by approximately eight (8) reindeer. The driver of the Vehicle appeared to be and in fact was, the previously referenced Claus.

Said Claus was providing specific direction, instruction and guidance to the approximately eight (8) reindeer and specifically identified the animal co-conspirators by name: Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donder and Blitzen

(hereinafter the "Deer"). (Upon information and belief, it is further asserted that an additional co-conspirator named Rudolph may have been involved.)

The party of the first part witnessed Claus, the Vehicle and the Deer intentionally and willfully trespass upon the roofs of several residences located adjacent to and in the vicinity of the House, and noted that the Vehicle was heavily laden with packages, toys and other items of unknown origin or nature. Suddenly, without prior invitation or permission, either express or implied, the Vehicle arrived at the House, and Claus entered said House via the chimney.

Said Claus was clad in a red fur suit, which was partially covered with residue from the chimney, and he carried a large sack containing a portion of the aforementioned packages, toys, and other unknown items. He was smoking what appeared to be tobacco in a small pipe in blatant violation of local ordinances and health regulations.

Claus did not speak, but immediately began to fill the stocking of the minor children, which hung adjacent to the chimney, with toys and other small gifts.

(Said items did not, however, constitute "gifts" to said minor pursuant to the applicable provisions of the U.S. Tax Code.) Upon completion of such task, Claus touched the side of his nose and flew, rose and/or ascended up the chimney of the House to the roof where the Vehicle and Deer waited and/or served as "lookouts." Claus immediately departed for an unknown destination.

However, prior to the departure of the Vehicle, Deer and Claus from said House, the party of the first part did hear Claus state and/or exclaim: "Merry Christmas to all and to all a good night!" Or words to that effect.





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given concerning manslaughter and negligent homicide. He also requested a self-defense instruction, which the district court allowed. However, during trial the court determined that there was insufficient evidence to present the jury with an instruction on negligent homicide. Therefore, the court prepared to move forward with an instruction only on murder and manslaughter.

After conferring with Fedmiller about the situation, defense counsel informed the court they opposed an instruction on manslaughter. Defense counsel reasoned that while defendant may have done something wrong, he could not be convicted of murder without the requisite intent and the intent for murder was higher than the lesser offenses. Taking the lesser offense of the table forced the jury to find that he either had the intent, and committed murder or was innocent.

On appeal, defendant claimed ineffective assistance of counsel for failure to seek a special mitigation instruction under Utah Code section 76-5-205.5. The Utah court of appeals held, “Because of the wide latitude counsel is given in making strategic decisions at trial, we cannot conclude that counsel acted unreasonably in pursuing such a strategy.” Defendant’s conviction was affirmed. *State v. Feldmiller*, 2013 UT App 275

Defendant Did Not Overcome Burden To Overturn Sentence

Defendant appealed his sentence on a conviction of aggravated assault. The court of appeals held that a sentencing decision of a trial court is reviewed for abuse of discretion and the defendant has the burden to prove the district court did not properly consider all of the factors.

In this case, the district court stated it carefully considered the information provided at sentencing. The district court stated that because defendant left the state for ten months prior to sentencing and that he was likely to do so again if placed on probation. The appellate court held the

sentence imposed was within the statutory limits for the conviction and that defendant did not overcome his burden. The sentence was affirmed. *State v. Goodluck*, 2013 UT App 263

Expert Testimony About Eyewitnesses Should Be Allowed

Guard was charged with kidnapping after a nine year old girl was grabbed from behind while walking home from school. The child was released and gave police a description. The next day, the victim was shown a six photo lineup, including Guard because he was suspected of a previous similar crime, and she identified Guard as the man who kidnapped her. At trial, the state’s case consisted of four eyewitnesses and the officer who interviewed the victim. Guard planned on having Dr. Dodd give testimony about the general fallibility of eyewitness identification. However, the court granted a motion by the State to exclude the testimony of Dr. Dodd. The court explained that it excluded Dr. Dodd’s expert testimony because it concluded that the potential problems with eyewitness identification could be adequately explained through the use of a jury instruction



Guard appealed the trial court’s decision to exclude Dr. Dodd’s testimony about the reliability of eyewitness identification. The Utah Court of Appeals held “in cases where the eye-witness is particularly vulnerable to fallibility when the witness is identifying a stranger and one or more established factors affecting accuracy are present the trial court should allow an expert to explain the limitations of eyewitness identification. The appellate court relied on a Utah Supreme Court decision, *Clopten*, that was decided about the same time as Guard’s case and instructed trial courts on when to use a Long jury instruction or when to allow

expert testimony on the unreliability of eyewitnesses. Guard’s conviction was vacated and the case was remanded for new trial. *State v. Guard*, 2013 UT App 270

Lack of Specific Findings Makes Decision Invalid

Hugoe was employed by the City as a master mechanic. After having multiple confrontations with other employees regarding missing tools, Hugoe stormed into his manager’s office and shouted “You don’t do anything around here and you can go fuck yourself and all of you can go fuck off.” At the time he was on probation for another incident involving him shouting vulgarities at a supervisor. He was terminated a short time later for “using vulgar and profane language in a threatening and insubordinate manner” towards his manager. He had also failed to comply with his probation conditions. Hugoe filed an appeal with the Board stating that the termination was a disproportionate and inconsistent sanction for his behavior. The Board unanimously affirmed the city administrator’s decision and stated that Mr. Hugoe’s actions, “standing alone, were so grievous as to justify termination of employment.”

Hugoe appealed claiming his termination was disproportionate and inconsistent sanction for his behavior. The Utah Court of Appeals held that the board did not address the evidence, presented by Hugoe, in its written decision and made no specific findings regarding any of the factors the court has held as important in deciding proportionality and consistency. The court of appeals held the “Board’s failure to make adequate findings regarding the

proportionality of the City’s decision to terminate Hugoe rendered that decision arbitrary and capricious.” The decision was set aside and the court



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directed the Board to make additional findings regarding whether termination was a proportionate disciplinary action for the City to have taken in this case. [Hugoe v. Woods Cross City, 2013 UT App 278](#)

Appeal Concerning Trial Scheduling Not Preserved

Johnson was charged with burglary, attempted theft, possession of a dangerous weapon by a restricted person, providing false information to a law enforcement officer and criminal mischief. The proceedings of the case were rescheduled several times on Johnson's request. At a pretrial conference, the court scheduled the case for trial, but set it as secondary priority to a case that was much older and had witnesses from out of state. Defense counsel did not object, but rather asked for another pretrial conference in case trial was not able to happen on that date.

On the date of the trial, the court notified both parties that the trial would not happen because the case with first priority was going forward. Defense counsel objected arguing that Rule 17(b) of the Utah Rules of Criminal Procedure required the court to give Johnson priority over the other case because Johnson was incarcerated and the other defendant was not. The court rescheduled the trial for a later date. Defense counsel then moved for a motion to dismiss arguing the court's failure to schedule the trial according to rule 17(b) prejudiced his defense. The court denied the motion and Johnson was convicted.

On appeal, Johnson argued the trial court erred when it continued [his] jury trial in violation of Rule 17(b). The Utah court of appeals held, "Whether rule 17(b) requires trial courts to automatically displace a case already calendared for trial when a higher-priority case subsequently competes for the same trial date is a matter of first impression." However, the court held Johnson did not properly preserve the issue for appeal because he did not raise the issue in a timely fashion, allowing the court to easily fix the scheduling error.

[State v. Johnson, 2013 UT App 276](#)

"Enactment" Of Ordinance Defined

Park City approved Ordinance 10-08 (the Ordinance), which created a subdivision and combined three separate properties into a single lot. A group of landowners (Landowners) objected to the ordinance claiming it adversely affects their property interests. After the ordinance passed, Landowners filed a complaint in the district court challenging the Ordinance. However, the City was not served with the complaint until much later in the year and the district court dismissed the complaint without prejudice. Landowners then filed another complaint and served the City properly. The City responded by filing a motion to dismiss and the district court granted the motion.



The district court found that the right to commence a new action is persevered only if the original action was "timely filed." The district court found that Landowners' original complaint was not timely filed under Municipal Land Use, Development, and Management Act (MLUDMA). The district court held that the term "enactment" as it appears in subsection 801(5) of MLUDMA "is not ambiguous and refers to the date the Ordinance was passed and adopted by the City Council." Because Landowners filed their original complaint more than thirty days after the City Council's passage of the Ordinance, the district court dismissed their complaint as untimely filed. Landowners appealed challenging the district court's interpretation of MLUDMA's filing requirements.

Landowners argued that MLUDMA's use

of enactment means when the ordinance would take effect, rather when it was passed. The Utah Court of Appeals agreed and held, publication is the required final step in the enactment of the Ordinance. Therefore, because Landowners filed their original complaint within thirty days of the publication of the ordinance their complaint was filed timely. The appellate court reversed the district court's ruling to the contrary and remanded for consideration of the merits of Landowners' challenge to the Ordinance. [Olsen v. Park City, 2013 UT App 262](#)

Deference Given To Attorney About Notice To Client

Defendant was charged with sexual abuse of a child, a second degree felony. Defendant retained counsel and then pled guilty to a reduced count of attempted sexual abuse of a child, a third degree felony. Defendant then retained new counsel and alleged his former counsel misled him about the length of his sentence and did not inform him of the immigration consequences of plea.

The judge originally assigned to the case ruled that defendant was misadvised and that he had a legitimate basis for withdrawing his plea. The state asked for additional time to present testimony from defendant's former attorney, but the request was denied. The state then moved for reconsideration because they had spoken with the former attorney and felt there were grounds to deny defendant's motion to withdraw.

Judge Skanchy was then assigned to the case and, over defendant's objections, heard testimony from defendant's former attorney. Judge Skanchy then denied defendant's motion to withdraw his guilty plea, finding defendant's former counsel's interaction with defendant did not rise to the level of ineffective assistance of counsel.

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Defendant appealed arguing that Judge Skanchy erred when he denied, on reconsideration, defendant's motion to withdraw his guilty plea. The Utah Court of Appeals held, "trial counsel's performance in advising defendant on the incarceration and immigration consequences of his guilty plea did not fall below "an objective standard of reasonableness," regardless of whether *Padilla* applies, because defendant was adequately informed of the potential incarceration and immigration consequences of his plea." The court upheld Judge Skanchy's denial of defendant's motion to withdraw his plea. [State v. Ruiz, 2013 UT App 274](#)

Tenth Circuit Court of Appeals

"Bladder Device" Provided Reasonable Suspicion

Defendant was pulled over for a traffic violation. The officer that stopped him knew he was known to use drugs and possess guns. The officer also knew defendant had been arrested for possession of drugs. When the officer approached defendant to write him a ticket, the officer

noticed a "bladder device" on the passenger seat. The officer knew that the "bladder device" was used to defeat drug tests. The officer also saw defendant was acting as if he was intoxicated or using drugs. Defendant told the officer he was on his way to take a urine test with his federal probation officer. The officer then called the probation officer to the scene. Defendant was placed under arrest and put in the back of the police car. The officers then searched defendant's car and found drugs and a gun.

Defendant was convicted and sentenced. He appealed claiming the officers did not have reasonable suspicion to extend the traffic stop. The U.S. Court of Appeals for the Tenth Circuit held, "an officer may nonetheless extend a detention when he or she observes specific and articulable facts supporting a reasonable suspicion that the driver is engaged in illegal activity." The Circuit court held the officer had reasonable suspicion because he knew defendant was on his way to take a drug test and that he had in the car a bladder device used to cheat drug tests, which is a violation of state law. The court held that the evidence of the bladder in combination of other facts gave the officer reasonable suspicion that defendant was committing a crime. [United States v. Cash, 2013 BL 307732, 10th Cir., No. 12-07072, 11/4/13](#)

Officials Didn't Qualify For Immunity Under Test

Appellee was awaiting trial as an eleven year old in a juvenile detention center in Kansas. The staff at the detention center used a restraining chair to restrain him. Sometime the restraint was in a legitimate effort to thwart appellee's attempts at suicide and self-harm. Other times the restraint was used as punishment. Appellee filed a 1983 claim alleging officers violated his Fourteenth Amendment right guaranteed to him as a pretrial detainee. Appellants claimed absolute immunity which shields public officials from suit as long as their conduct didn't infringe any legal rights clearly established at the time.

The U.S. Court of Appeals for the Tenth Circuit held the *Bell* test informs courts about when the actions of officials violate detainee's constitutional rights. The test is: 1) whether an "expressed intent to punish on the part of detention facility officials" exists. The court held that if the intent is present then liability may attach. 2) If the intent is not present, then "a plaintiff may still prove unconstitutional punishment by showing that the restriction in question bears no reasonable relationship to any legitimate governmental objective." Here, the Circuit Court held, that while some of the times appellee was restrained in the chair might have been legitimate, there were clearly

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times when the officials used the restraints to punish appellee and which did not serve any penological purpose. The court held that the facts preclude the qualified immunity at summary judgment.

[Blackmon v. Sutton, 2013 BL 310154, 10th Cir., No. 12-3199, 11/8/13](#)

Other Circuits/ States

GPS Tracker Without Warrant Authorization Unconstitutional

Law enforcement noticed a wave of pharmacy burglaries, in particular Rite Aid pharmacies. The alarm systems for the pharmacies would be disabled by cutting the external phone lines. Defendant became a suspect because he had been caught burglarizing a Rite Aid, had a criminal history of burglary and robbery and was an electrician. As the police began watching defendant he became involved in other pharmacy burglaries, even though he was not arrested. During the investigation, law enforcement decided to put a “slap-on” GPS tracker on the exterior of defendant’s van.

Within several days the van left defendant’s home town and parked at a Rite Aid at for over two hours. The people watching the GPS told the local police that they might have a burglary happening. When the van moved again, the FBI called local police and told them to stop the van and arrest defendant. The police found Rite Aid merchandise and pharmaceuticals in the van. Defendant moved to suppress the evidence found in the van. The government opposed the motion on many grounds including that the police had acted in good faith when installing the GPS device.

The U.S. Court of Appeals for the Third Circuit stated, “the Supreme Court has stated that the automobile exception

permits a search that is “no broader and no narrower than a magistrate could legitimately authorize by warrant,” the search is still limited to a discreet moment in time.”

The Circuit court then held, “a GPS search is sufficiently different from the type of search sanctioned by the automobile exception jurisprudence — and that, as a consequence, even the extensive scheme of regulation now affecting motorists does not permit the government to dispense with asking for permission from a neutral magistrate when seeking to physically intrude upon a target vehicle for longer than is necessary to locate, remove, and/or verify the presence of already-existing evidence of criminal wrongdoing.”

For these reasons the Circuit Court held “the warrantless search in this case was not justifiable based solely on reasonable suspicion or probable cause, was thereby unreasonable, and consequently violated the Fourth Amendment.” The Circuit Court also held, “to that end, the Supreme Court has recognized the existence of a “good faith” exception to the exclusionary rule in cases where the police “act[ed] with an objectively reasonable good-faith belief that their conduct [was] lawful.” Supreme Court has held this exception to cover situations where law enforcement personnel have acted in objectively reasonable reliance on some seemingly immutable authority or information that justifies their course of action unpersuasive and therefore hold that the good faith exception does not apply here.”

[United States v. Katzin, 2013 BL 292119, 3d Cir., No. 12-2548, 10/22/13](#)

Prosecutor Statement That Defendant’s Life Was Wasted Not Prosecutorial Misconduct

Defendant was charged with 24 different charges in relation to an attempted robbery where defendant shot and killed a police officer, but was also shot and injured while fleeing. Defendant was sentenced to life in prison and death. Defendant moved for a

new trial and the district court vacated the jury’s death verdict and ordered a new sentencing hearing. The government appealed the district court’s decision and the U.S. Court of Appeals for the Sixth Circuit reversed holding the death sentence was not inconsistent or irrational. Defendant then filed a direct appeal raising twenty-four claims of error. One of the errors defendant claimed was that the prosecutor was prohibited from claiming the lives of the victims were worth more than the life of the defendant.

The U.S. Court of Appeals for the Sixth Circuit held the prosecuting attorney is given “wide latitude” during closing argument and the court uses a two-step process to evaluate claims of prosecutorial

misconduct. First, the court determines whether the prosecutor’s comments were

improper. Second, if the comments were improper, the court considers whether they were so flagrant as to warrant reversal. To warrant reversal, prosecutorial misconduct must have rendered the trial fundamentally unfair. Four factors guide the court’s determination of flagrancy: “(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong

Here, the circuit court held, “The prosecutor’s urging the jury to “weigh” the victim-impact evidence against defendant’s mitigating evidence is entirely consistent with case law’s recognition that victim-impact evidence is properly considered to “counteract” the mitigating evidence in helping the jury evaluate moral



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culpability.” The Circuit court also held, “the prosecutor’s characterization of Lawrence’s life as “wasted” was indelicate, but it was not so inappropriate as to render the remark improper or flagrant.” [United States v. Lawrence, 2013 BL 290909, 6th Cir., No. 06-4105, 10/22/13](#)

Packets Of Drugs Must Be Individually Tested

Defendant was arrested at his house on suspicion of drug trafficking. In his garage there was a big Ziploc baggie that contained nine little Ziploc baggies with white powder in them. Each of the baggies was field tested at the house and each showed that they contained cocaine. Defendant was read his Miranda rights and admitted that the cocaine was his. The baggies were then transferred to the sheriff’s office, where each baggie was emptied into nine envelopes. However, the Florida Crime Lab received one sealed Ziploc bag containing the contents of all nine baggies.



On appeal, defendant claimed the trial court erred by denying his motion for judgment of acquittal on the trafficking charge because the State combined, tested, and weighed the contents of all of the baggies together instead of individually.

The Florida Supreme Court held that the statute defined and punished the distribution of counterfeit or look-alike substances differently and less severely than controlled substances and mixtures of controlled substances. The supreme court held “the process of commingling creates an unjustifiably high risk that non-controlled substances will be inappropriately mixed with controlled substances.” The court also held, the State must chemically test every individually

wrapped packet of white powder seized in order to establish the statutory threshold weight for trafficking. The supreme court emphasized, “this rule only applies when the substance discovered is one that poses an identifiable danger of misidentification, such as the white powder discovered in this case.” The Supreme Court reversed the trial court’s decision and remanded the case. [Greenwade v. State, 2013 BL 286692, Fla., No. SC12-598, 10/17/13](#)

Deportation Does Not Forfeit Bond

The appellant, Big Louie Bail Bonds inc., posted bail bonds for nine defendants. Big Louie agreed to the terms of the bond, including that if the defendant did not appear for trial the bond was forfeited. The defendants in this case were arrested and held by ICE and then deported before they could appear for trial, thus forfeiting the bond.

The appellant argued that because the defendants did not flee, but were instead deported and under Maryland law the forfeiture of the bonds should have been stricken because the failure to appear was based on reasonable grounds. The State argued denying the bail was proper because the defendants voluntarily did not appear for trial (were deported) because they entered and remained in the country illegally. The Maryland Supreme Court held the defendants did not voluntarily deport themselves and it is not Maryland law that bail must be denied merely because an individual is subject to an I.C.E. detainer or at risk of being deported. The court reversed the Circuit Court and remanded the case. [Big Louie Bail Bonds v. State, 2013 BL 294172, Md., No. 31, 10/23/13](#)

Answer To Teacher’s Question Was Testimonial

A teacher at a preschool noticed L.P., a three and half year old, had a bloodshot and blood stained eye. The teacher upon closer inspection noticed there were marks around the eye like the boy had been whipped. The teacher asked L.P., “Who

did this to you?” and the boy responded, “Dee.” The teacher then called social workers and it was determined that the boy and his sister had been abused. The boy and his sister had been living with their mom and her boyfriend, Darius Clark. Clark was arrested and charged with child abuse.

At trial, L.P. was found incompetent, but his hearsay statements about who caused the injury to his eye were allowed in court. Defendant was convicted on all charges. Defendant appealed claiming the trial court violated his right to confrontation by allowing witnesses to testify about the statements L.P. made to his preschool teachers.

The Ohio Supreme Court held, “Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged



perpetrator of suspected child abuse are testimonial in nature in accordance with *Davis v. Washington*.” [State v. Clark, Ohio, No. 2012-0215, 10/30/13](#)

Witness Who Approved and Signed Report May Testify

Defendant was stopped by a police officer for faulty license plate and brake lights. During the course of the stop, the officer saw signs that defendant had been drinking. Defendant was arrested for DUI and transferred to the hospital where a blood sample was drawn and shipped to the lab for testing.

While at the lab, defendant’s blood sample was tested three times. Then a review of the tests was conducted by the Assistant

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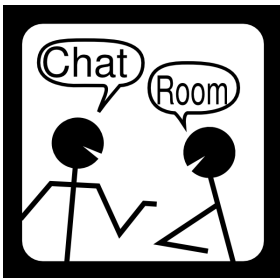
Lab Director and he signed off on the document summarizing the tests and certifying the results. At trial, the prosecutor introduced the testimony of the Assistant Lab Director and the report he signed. Defendant appealed claiming his right to confront the person who performed the test was denied violating his Sixth Amendment right.

The Pennsylvania Supreme Court held, "the testimony of the forensic toxicologist who analyzed the test results of Appellant's blood, determined the BAC by comparing these results, and authored the Toxicology Report, satisfied Appellant's right to confrontation." The conviction was upheld. [Commonwealth v. Yohe, Pa., No. 75 MAP 2012, 10/30/13](#)

Statute Prohibiting Sexual Communication With A Minor Unconstitutional

Appellant was charged with third degree felony of communicating in a sexually explicit manner with a person whom he believed to be a minor with intent to arouse or gratify his sexual desire. He filed a pretrial application for a writ of habeas corpus alleging that this specific subsection of the felony offense of online solicitation of a minor is facially unconstitutional for three distinct reasons: (1) it is overbroad and criminalizes a wide range of speech protected by the First Amendment;

(2) it is vague because the term "sexually explicit" communications that "relate to" sexual conduct chills the exercise of free-speech by causing citizens to steer wide of the uncertain boundaries between permitted and prohibited speech; and (3) it violates the Dormant Commerce Clause. The trial judge denied relief, and the court of appeals affirmed.



The Court Of Criminal Appeals Of Texas held, "Because the court of appeals used the wrong standard of review for addressing constitutional challenges to a penal statute that restricts speech based on its content, it reached the wrong conclusion. The court should have applied the constitutionally required presumption that "content-based regulations [of speech] are presumptively invalid and are subject to strict scrutiny." The Court Of Criminal Appeals Of Texas then concluded, "Section 33.021(b) of the Texas Penal Code is overbroad because it prohibits a wide array of constitutionally protected speech and is not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse." The court did not address whether the provision is also unconstitutionally vague or violates the Dormant Commerce Clause. The Court Of Criminal Appeals Of Texas reversed the court of appeals and remanded the case to dismiss the indictment. [Ex Parte Lo, 2013 BL 301507, Tex. Crim. App., No. PD-1560-12, 10/30/13](#)

Questioning Deemed Custodial Interrogation

Law-enforcement found a picture of a naked minor boy with an email address attached. The agent emailed the address and asked for child-pornography images. The agent received twenty four explicit pictures of a naked boy. Agents then traced the email address to an IP address and found that it was being used by someone in the appellant's home. Agents raided the home and questioned everyone.

Appellant was questioned in his basement in an unfinished room. He was told he was free to leave, was not read his Miranda rights and was questioned for three hours. During the investigation agents told him he could not be left alone while in the house and lied to him about recording the conversation. Appellant moved to suppress the evidence arguing he was in custody during the interrogation and he was not given his Miranda rights. The trial court denied the motion and defendant pled

guilty to some of the charges and was convicted of the others.

The U.S. Court of appeals for the Fourth Circuit held defendant was in custody when interrogated and the lower court should have suppressed the incriminating statements he made. The Circuit Court reversed the conviction saying, "The broader setting makes clear why a few isolated statements by law enforcement in the course of a three-hour interrogation cannot erase its custodial nature." [United States v. Hashime, 4th Cir., No. 12-5039, 10/29/13](#)

Clarifying Question Not Interrogation

Defendant was pulled over for weaving across the road while driving. The officer noticed the smell of marijuana and asked to search the car. The search turned up nothing, but the officer noticed that defendant was hiding something in his mouth. The officer told him to spit it out and defendant spit out two baggies of marijuana.



Defendant was arrested and put in the back of a police car. On the way to the station defendant said, "I can help you out, I don't want to go back to jail, I've got information for you." The officer replied, "What do you mean?" Defendant told the officer, "I can get you a gun." The officer then read defendant his Miranda rights and advised him to not say anything else until they got to the station.

At the station, defendant was again read his Miranda rights and signed a waiver of those rights. He then told the officers where a gun was in his home and consented to a search of his house. The officers searched the home, found the gun and defendant was convicted of being a felon in possession of a firearm.

Defendant moved to suppress and then

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appealed claiming his Fourth Amendment rights had been violated. On appeal, the U.S. Court of Appeals for the Fourth Circuit held, the officers did not conduct an unwarned custodial interrogation when asking, “What do you mean?” because to expect the officer to know defendant was going to incriminate himself, instead of someone else, was too low of a bar. [United States v. Johnson, 2013 BL 300025, 4th Cir., No. 12-4176, 10/29/13](#)

Presumption of Prosecutorial Vindictiveness Not Overcome

While Daniel LaDeau, defendant, was in prison, he and his brother, David, were suspected of writing letters about how to obtain and hide child pornography. Law enforcement obtained a search warrant and searched the home of Daniel and found child pornography. He was charged with one charge of possessing child pornography.

Daniel moved to suppress the evidence and the district court granted the motion to suppress, leaving no admissible evidence of possession of child pornography. Ten days before trial was scheduled to begin the government obtained a superseding indictment, adding Daniel’s brother David, and charging them both with conspiracy to receive child pornography.

Daniel then moved to suppress the superseding indictment for prosecutorial vindictiveness because the new charge carried a harsher penalty. Daniel argued the government pressed the new charge thirteen months after the initial charge and just after Daniel won the suppression hearing. The government did not have a strong reason for why there was a thirteen month delay when they initially intended to bring both charges. On appeal, the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal of the superseding indictment. The Circuit Court held the government did not overcome the presumption of vindictiveness by claiming the intent to charge both crimes, but then charging them thirteen months apart and

just after a successful suppression of evidence by the defendant. [United States v. LaDeau, 2013 BL 304342, 6th Cir., No. 12-6611, 11/4/13](#)

Lack of Finding During Voir Dire Does Not Overturn Batson Challenge

Defendant was charged with four counts of drug and gun charges. During *voir dire*, defendant challenged the government’s use of preemptory strikes against black prospective jurors under *Batson v. Kentucky*. The district court asked the prosecutor to articulate the reasons for the strikes and the government did so stating the juror’s demeanor and other perceived sources of bias towards the government.

The court, which witnessed the *voir dire*, denied the *Batson* challenge finding the government had articulable reasons for striking the black prospective jurors. Defendant appealed the denial. The U.S. Court of Appeals for the Fifth Circuit held



district courts are not required to make record findings of jurors demeanor before ruling on *Batson* challenges. The court held there was no reversible error in the district court’s failure to make further record findings on Juror’s demeanor.

[United States v. Thompson, 2013 BL 313152, 5th Cir., No. 12-31203, 11/12/13](#)

Lack Of Investigation Prompts Ineffective Assistance Of Counsel

Petitioner was charged with sexual abuse, child molestation and other charges. He had three lawyers through the legal process. The first lawyer represented him on federal charges, which were dropped. The second lawyer represented him on state charges, which were not pursued. The third lawyer represented him on different



state charges all the way through the trial.

The first two lawyers and petitioner knew the victim had recanted her story to a priest.

At trial defendant’s counsel did not have the priest testify. Petitioner appealed his conviction claiming ineffective assistance of counsel. The trial court denied the appeal stating petitioner knew about the victim’s recantation and failed to tell his lawyer and the recanting to the priest would not have changed the outcome of the case because the victim admitted recanting to her mother at trial.

Petitioner then filed for federal habeas relief stating the same claims. The magistrate judge recommended denying the petition on the merits and dismissing with prejudice. The district court agreed with the magistrate and held the recantations would have been largely cumulative in basic effect. The district court did grant a certificate of appealability on the claim about trial counsel’s investigation and presentation of evidence of the victim’s recantations. Petitioner also claimed that the state court unreasonably applied clearly established federal law regarding ineffective assistance of counsel.

The Court of Appeals for the Ninth Circuit held, “The state courts erred by determining that counsel’s performance did not prejudice [petitioner]. Under these circumstances, counsel’s failure to read [petitioner’s] client file is not excused by the failure of the client to inform counsel of what was in the file. And counsel’s abdication of his duty to investigate, particularly given the case’s long history of failed prosecutions, is deficient performance under *Strickland*. In this case, the deficient performance was also

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prejudicial because the recantations were not merely cumulative, and proper disclosure to the jury could have tipped the scales in [petitioner's] favor. The State's suggestion to the contrary is simply not persuasive. Petitioner's claim therefore meets the *Strickland* standard for ineffective assistance of counsel, and his petition for relief must be granted." The Circuit court reversed and remanded the case. [Vega v. Ryan, 2013 BL 314888, 9th Cir., No. 12-15631, 11/13/13](#)

Unidentified 911 Calls Don't Provide Reasonable Suspicion

NYPD received two phone calls reporting that a Hispanic male wearing a black hat and white t-shirt was arguing with a woman and had a gun near a chase bank. The caller would not identify herself and was never found after the incident. During the investigation, the description of the man changed to a black man in the same clothes. Police responded to the area and found defendant in the area. Two officers grabbed him and wrestled him to the ground and found a pistol in his pants. Defendant moved to suppress the evidence and was denied.



On appeal, defendant claimed the police lacked reasonable suspicion to stop him. The U.S. Court of Appeals for the Second Circuit held, "the pair of anonymous calls to 911 lacked any indicia of reliability and did not provide the police with the reasonable suspicion needed to stop [defendant]." [United States v. Freeman, 2013 BL 309128, 2d Cir., No. 12-2233, 11/7/13](#)

Cap On Prisoner's Attorney's Fees Constitutional

Wilkins was a prisoner when a guard and him started arguing. The argument led to the guard opening Wilkins's cell and



physically subduing him. According to Wilkins, the guard body slammed him to the ground, pinned him down, punched, kicked, kneed and choked him. Wilkins alleged the altercation caused him a bruised heel, back and neck pains, headaches, and other health complications.

Wilkins filed a § 1983 claim alleging the guard used excessive force in violation of his Eighth Amendment rights. The jury returned a verdict holding the guard responsible for using excessive force against Wilkins, but declined to award compensatory or punitive damages. Instead, it awarded only nominal damages of \$0.99. The district court entered judgment for Wilkins in the amount of \$1. Wilkins, as the prevailing party, filed a motion under the fee-shifting provision of 42 U.S.C. § 1988 for \$92,306.25 in attorneys' fees. While acknowledging that fee awards in prisoner lawsuits are capped by § 1997e(d)(2), Wilkins argued that this section of the PLRA violated the Fifth Amendment's equal protection component by irrationally treating prisoner and non-prisoner litigants differently. The magistrate judge to whom the matter had been referred calculated the award pursuant to § 1997e(d)(2) and recommended that Wilkins's lawyers be awarded \$1.40.

Wilkins appealed and the U.S. Court of Appeals for the Fourth Circuit upheld 1997e(d)(2) as constitutional. The Circuit

Court held that Congress had the power to legislate about whether or not attorney's fees should be awarded and that Congress had a rational basis for creating the mathematical cap to attorney's fees under 1997e(d)(2). [Wilkins v. Gaddy, 2013 BL 304078, 4th Cir., No. 12-8148, 11/1/13](#)

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

February 27-28	SEX CRIMES CONFERENCE <i>Specialized training for prosecutors and investigators</i>	Miller Conf Center Sandy, UT
April 10-11	SPRING CONFERENCE <i>Legislative and case law updates, civility/professionalism and more</i>	Sheraton Hotel Salt Lake City, UT
June	UTAH PROSECUTORIAL ASSISTANTS ASSN. ANNUAL CONFERENCE <i>Training for non-attorney staff in prosecutor offices</i>	Location TBA Wasatch Front
July 31 - August 1	UTAH MUNICIPAL PROSECUTORS ASSN SUMMER CONFERENCE <i>Training for city prosecutors and others who carry a misdemeanor case load</i>	Crystal Inn Cedar City, UT
August 18-22	BASIC PROSECUTOR COURSE <i>Trial advocacy and substantive legal instruction for new prosecutors</i>	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual CLE and idea sharing event for all Utah prosecutors</i>	Courtyard by Marriott St George, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training designed specifically for civil side attorneys from counties and cities</i>	Zion Park Inn Springdale, UT
November	ADVANCED TRIAL SKILLS COURSE <i>For felony prosecutors with 3+ years of prosecution experience</i>	Location TBA Salt Lake Valley

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

22 dates and locations around the country	INVESTIGATION AND PROSECUTION OF MORTGAGE FRAUD AND VACANT PROPERTY CRIME <i>This 2 day course will be held in many different locations throughout the country during 2013 & early 2014</i> Flyer Full Info Lodging Scholarship Application	
January 27-31	SUCCESSFUL TRIAL STRATEGIES Registration Flyer <i>Up-to-the minute instruction on trial advocacy skills, trial preparation and other methodologies.</i>	San Antonio, TX
February 24-28	PROSECUTING HOMICIDE CASES Summary Agenda <i>Fine tune investigative techniques and enhance your trial skills and your strategic planning</i>	San Francisco, CA